SUPREME COURT, U. S.
FILE
JAN 21

No. 73-529

In the Supreme Court of the United States

OCTOBER TERM, 1973

RAFAEL R. MARTINEZ, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-529

RAFAEL R. MARTINEZ, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the validity of a search and seizure and the constitutionality of various provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970.

After a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on two counts of possession of marihuana with intent to distribute and conspiracy to import and possess marihuana, in violation of 21 U.S.C. 841, 846, 952, and 963. He was sentenced to concurrent terms of five years' imprisonment, to be followed by ten years' special parole. The courts of appeals affirmed (Pet. App.).

In January 1972, customs agents were advised by a reliable informant that an orange flatbed truck would arrive in San Antonio, Texas, on January 28, carrying

600-650 pounds of marihuana (Tr. 56, 144-145, 149).[1] On that afternoon, the truck crossed the border at Laredo, Texas. Continuous surveillance of the truck began approximately one-half hour later at a cafe in Laredo (Tr. 57-59). The surveillance continued for several days as the truck was driven to various locations in southern Texas, with occasional changes of drivers (Tr. 60-67). On January 31, 1972, while the truck was unoccupied, customs agents examined its underside and detected an odor which they recognized as marihuana (Tr. 67-68). They did not make an immediate search, however, because they hoped to apprehend the unknown persons to whom the marihuana was to be delivered (Tr. 79).

On February 3, 1972, the truck was joined near San Antonio by a Ford automobile carrying two persons, one of whom was a previous driver of the truck. The car drove off, and the truck proceeded toward San Antonio. The Ford reappeared with two other persons, and both vehicles, under surveillance, began following a circuitous route through a residential district of San Antonio. After some time, the automobile again drove away, and the truck proceeded south. At that point, believing that the surveillance had been discovered, the customs agents halted the truck (Tr. 112, 176-178). A search revealed a secret metal compartment on the underside of the truck, extending the length of the frame and containing numerous packages of marihuana wrapped in brown paper. More than an hour was required to unload the several hundred one-pound packages in the compartment (Tr. 179, 209-210).

---

[1] "Tr." refers to the transcript of the pre-trial hearings, a copy of which is being lodged with the Clerk of this Court.

The driver of the truck identified petitioner as a participant in a plan to import and distribute the marihuana. It was also learned that petitioner had been one of the persons present in the Ford automobile on February 3, 1972. Petitioner was subsequently arrested, pursuant to a warrant (Tr. 180, 186, 189-190, 203).

1. Petitioner contends that the warrantless search of the truck violated the Fourth Amendment. The court of appeals disposed of this claim by sustaining the inspection as a border-area customs search (Pet. App.). It is unnecessary, however, to consider whether that conclusion is correct, since, as the court below also recognized (Pet. App. 29, n. 10), the search was properly made upon probable cause under exigent circumstances.[2]

At the time the surveillance began, customs agents had no evidence other than a reliable informant's tip that the described truck would be traveling to San Antonio with a load of marihuana. As the surveillance indicated, however, the truck did not proceed immediately to San Antonio, but was driven to three other cities in southern Texas over a period of six days. After three days of surveillance, the agents approached the truck and detected the odor of marihuana. They then had probable cause to believe that the truck carried contraband, for the facts and circumstances within their knowledge corroborated the earlier tip. *Chambers* v. *Maroney*, 399 U.S. 42, 46; *Draper* v. *United States*, 358 U.S. 307, 313; *Carroll* v. *United States*, 267 U.S. 132, 162.

---

[2] We also submit that petitioner is without standing to complain of the search, even though he was charged with a possessory offense, since his actual possession was not contemporaneous with the search. In this respect, the continuing vitality of the "automatic standing" rule of *Jones* v. *United States*, 362 U.S. 257, was left in serious doubt by *Brown* v. *United States*, 411 U.S. 223, 229.

The officers did not search the vehicle as soon as probable cause appeared because they sought to apprehend the consignees of the marihuana shipment, not merely the driver of the truck. This was a wholly legitimate aim, which violated no right of petitioner. The officers were not obliged to cease their investigation as soon as they possessed the minimum evidence required to support a search or arrest. See *Hoffa* v. *United States,* 385 U.S. 293, 310.

The officers halted their investigation, however, when it became evident that their surveillance had been detected and the truck began to drive south, in the direction of the border. At that point, it was no longer possible to await delivery of the marihuana before making an arrest; an immediate search was required to prevent the evidence from being lost or destroyed. Since there was then insufficient time to obtain a warrant, it was proper for the agents to halt the truck and search it immediately. *Chambers* v. *Maroney, supra,* 399 U.S. at 51-52; *Carroll* v. *United States, supra,* 267 U.S. at 153; see also *Cady* v. *Dombrowski,* 413 U.S. 433.[3].

2. Petitioner challenges the constitutionality of the special parole provisions contained in 21 U.S.C. 841(b)(1)(B) and 21 U.S.C. 960(b)(2) on the ground that these provisions do not specify a maximum parole term. Each of these statutes mandates a minimum two-year special parole term, in addition to the prison sentences provided for the crimes of which petitioner was convicted; the statutes do not set a maximum special parole term. Petitioner was sentenced to ten years of special parole

---

[3] *Almeida-Sanchez* v. *United States,* 413 U.S. 266, does not apply here, since there was in that case concededly no probable cause to stop or search the vehicle.

to follow his concurrent five-year sentences. He contends (Pet. 20) that the proper punishment for his offenses may not exceed the maximum prison sentences and fines permitted by law. Even assuming that this issue is presently "ripe" for resolution (but see *United States* v. *Simpson,* 481 F. 2d 582 (C.A. 5), certiorari denied, December 10, 1973, No. 73-5434), there is no merit to this claim.

Petitioner's analysis overlooks the intent of Congress in revising the mandatory sentence provisions which existed under prior federal law. While legislative history regarding the special parole term is sparse, it is apparent from the congressional debates that the new sentencing provisions were not intended solely to liberalize the lengthy terms and mandatory sentences of the old law, but were also designed to afford judges more flexibility in sentencing and allow them to distinguish minor offenses from more serious ones.

The new penalties contemplated an initial incarceration, with a fixed maximum, with sufficient flexibility for the sentencing judge to fashion more lenient or more severe punishment as the occasion warranted, including the use of supervised parole. The purpose was to restore to the judge the traditional discretion which had been limited by the prior law. See 115 Cong. Rec. 39253 (remarks of Senator Dodd); 116 Cong Rec. 1182 (remarks of Senator Thurmond); 116 Cong. Rec. 1665 (remarks of Senator Hruska); see also Hearings on Narcotic Legislation Before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, pursuant to S. Res. 48, 91st Cong., 1st Sess., pp. 278, 676. Thus, Congress probably would not have set so light a penalty for felony drug offenses as a maximum five-year prison term, had it not provided

that the defendant could be subject to further supervision under the special parole provisions. See *United States* v. *Simpson, supra,* 481 F. 2d at 584-585.

Nor does petitioner's punishment violate the Eighth Amendment. If petitioner had been sentenced to consecutive terms for the two offenses of which he was convicted, he could have received a sentence of ten years in prison, plus a minimum of four years of special parole—a sentence nearly as long as and much more restrictive than that which he actually received. A lengthy special parole term in the instant case was clearly appropriate for petitioner, who was not a casual violator of the law, but a participant in a large-scale scheme to import large quantities of illicit drugs for distribution in the United States. See *United States* v. *Simpson, supra,* 481 F. 2d at 585; *United States* v. *Scales,* 464 F. 2d 371 (C.A. 6).

3. Petitioner contends that Title II of the Comprehensive Drug Abuse Prevention and Control Act is unconstitutional because it proscribes intrastate, as well as interstate activities. Since petitioner's offense involved the importation of marihuana from Mexico—a transaction clearly within the power of Congress to regulate—he cannot be heard to complain of the statute's application to him. *United States* v. *Thaggard,* 477 F. 2d 626, 630 (C.A. 5), certiorari denied, December 3, 1973, No. 73-242; *United States* v. *Harris,* 460 F. 2d 1041, 1048 (C.A. 5), certiorari denied, 409 U.S. 877.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1974.

DOJ-1974-01